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IN THE

Supreme Court of the United States

October Term 1971

No. .....

FERRIS JACOB ALEXANDER
Petitioner

vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner, Ferris Jacob Alexander, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered April 14, 1972, denying Petitioner's motion made pursuant to the provisions of *28 U.S.C. 2255*. The Second Circuit rendered no opinion when it denied Petitioner's motion.

JURISDICTION

The jurisdiction of this Court is invoked under *28 U.S.C. 1254(1)*.

QUESTIONS PRESENTED

1. Whether Petitioner was denied a fair trial under the due process provisions of *Amendment V, Constitution of the United States* and was denied effective assistance of counsel as required by *Amendment VI, Constitution of the United States*, where

   a. Proof of alleged criminal conduct by Petitioner depended upon the testimony of a government witness who could not make a positive identification as between petitioner and a co-defendant, both of whom were represented by the same counsel on the same charge where throughout the trial petitioner's counsel was laboring under an undisclosed conflict of interest by his known representation of three co-defendants hindering his decision whether to allow petitioner to testify and call the severed co-defendant as a witness where the testimony of petitioner and co-defendant would be exculpatory for petitioner but inculpatory for the co-defendants, and

   b. The Government, anticipating the inability of their witness to make an identity between the two co-defendants, caused a severance of one co-defendant, represented by the same counsel as that of Petitioner, and thereby created a suggestive in-court identification of Petitioner and failed to disclose to the Court and counsel for Petitioner prior to trial the witness' inability to identify petitioner and another co-defendant, and

   c. The Trial Court failed to inquire whether the defendant was able to make a knowing and intelligent decision as to choice of counsel who also represented co-defendants to petitioner's prejudice.

2. Whether the trial court denied petitioner's Fifth and Sixth Amendment rights in denying petitioner a new trial pursuant to Title 28 U.S.C. Sec. 2255 where the averments of petitioner's motion were uncontroverted by the Government that petitioner's attorney represented three additional co-defendants in the same matter and the trial court made a finding that there was no dual representation dehors the record without hearing.

STATEMENT OF THE CASE

Following a jury trial in the United States District Court for the Southern District of New York (MacMahon, Jr., presiding), appellant was convicted on two counts charging him with transporting obscene material in interstate commerce for the purpose of sale and distribution, in violation of 18 U.S.C. 1465, and on one count charging him with conspiring to do so, in violation of 18 U.S.C. 371. He was sentenced to three concurrent terms of imprisonment of eighteen months and fined $20,000. The Court of Appeals for the Second Circuit affirmed the conviction on July 7, 1971 (*United States v. Manarite et al.*, 448 F. 2d 583, and, on November 9, 1971, the Supreme Court denied a petition for writ of certiorari (404 U.S. 947).

Following incarceration, appellant filed a motion under 28 U.S.C. 2255 to vacate his sentence on the ground that his retained trial attorney was laboring under a conflict of interest. On February 29, 1972, Judge MacMahon denied the motion without a hearing on the ground that the claim was refuted by the files and records of the case.

On April 14, 1972 the Court of Appeals for the Second Circuit denied Petitioner's appeal without an opinon.

The Petitioner, in support of his Motion, alleged that counsel who represented him at the trial of the action herein was laboring under such a severe conflict of interest that it rendered him incapable of adequately defending him in terms of the Sixth Amendment.

Petitioner's complaint of conflict of interest rested upon the facts which were made clear to him after the conclusion of his trial. The indictment herein named the Petitioner along with fourteen other co-defendants, including the Petitioner's brother, Edward Jacob Alexander. Both the Petitioner and his brother retained Herald Price Fahringer of Buffalo, New York, to represent them in this litigation. Fahringer, at the time he was retained by the Alexanders, represented co-defendants Max Bornstein and Paul Wolf. Wolf did not respond to the processes of the Court and remains a fugitive. Prior to trial, Fahringer advised Bornstein to retain other counsel and represented to the Court that this substitution was due to a possible conflict of interest. Ultimately it became clear that Fahringer still maintained a degree of loyalty and responsibility to both Wolf and Bornstein in his representation of the Alexander brothers. This basic conflict was compounded by the fact that there was a strong conflict of interest between the Petitioner and his brother who was severed prior to the trial. Despite this severance, the conflict remained apparent. The trial transcript disclosed that the Petitioner was implicated by his alleged meetings with one of the Government's principal witnesses, Bruce Valentine. These meetings allegedly effected the transportation of obscene materials from New York to Minneapolis, Minnesota. The testimony of this witness demonstrated confusion as to which of the Alexander brothers was involved on specific occasions. The Petitioner's involvement in that conspiracy and substantive acts could have

been easily negated if it were shown, as the Petitioner alleged the fact to be, that it was his brother Edward Jacob Alexander, who met with various co-conspirators during the alleged period of the conspiracy. It is respectfully submitted that the fact that one brother claims to have participated in some degree while the other brother denied participation, is in and of itself, a classic example of conflict of interst which counsel had an obligation to reveal.

This basic conflict is complicated by the fact that Petitioner's brother, Edward Jacob Alexander, made repeated efforts to testify on his brother's behalf after learning that the Petitioner had been erroneously implicated and that each of these efforts was rebuked by Fahringer. Moreover, Petitioner, who had never previously been convicted of a crime, strongly asserted his desire to testify and make clear that it was not he who met with the co-conspirators' witness, Bruce Valentine.

Both Alexanders, after conferring with Fahringer, made it known that their testimony would not only exculpate the Petitioner but would strongly implicate Paul Wolf and Max Bornstein, who was ultimately acquitted. However, Fahringer was faced not only with a dilemma concerning the two brothers but with a trilemma which reflected his loyalty not only to the Alexanders but to Bornstein and Wolf, who is still subject to be tried. This division of loyalty, it is submitted, resulted in an acute deprivation of Petitioner's right to be adequately represented by counsel. Petitioner did not challenge the competence of counsel which he retained, however, this conflict of interest, undisclosed by counsel, reached equal Constitutional importance.

This Court had affirmed Petitioner's conviction and dismissed Petitioner's claim as to sufficiency of evidence by stating at 4041, 2:

"In January, 1969 Ferris Alexander came to New York and ordered some hard core materials from Portella and Portella told Alexander that he would send him these materials."

Fahringer did not allow Petitioner to testify that it was not he who was in New York, nor would he call Edward Alexander to testify that he was in New York, January, 1969. Before the Grand Jury the Government's witness testified that it was the younger Alexander brother (Edward) who met in New York. Again, the importance of whether Petitioner or his brother was in New York is apparent from page 4046 of the Circuit Court's opinion. The Court stated:

"On this record it is obvious that Alexander must have known this material which was delivered to him in quantities of 10,000 copies at a time was also being distributed to other dealers. He visited Portella in New York and must have been aware of the nature and extent of the conspiracy and its operation. See *United States v. Aiken*, 373 F. 2d 294 (2d Cir. 1967), cert. denied, 389 U.S. 833 (1967)."

Had it been known that Petitioner did not in fact travel to New York in January, 1969 but that Petitioner's brother was in fact in New York at that time it could not have been said that, "Petitioner ordered some hard core materials" or that he "must have been aware of the nature and extent of the conspiracy and its operation."

At the trial Bruce Valentine, a Government witness, made an in Court identification of Petitioner. Fahringer did not request a hearing to determine the circumstances surrounding this identification. The trial transcript reproduced below shows

that the Government's witness could not make a positive identification as between Petitioner and Edward Alexander a co-defendant.

Q. Okay. Now, going back to the Grand Jury, do you recall being asked whether you know Ferris Alexander, Edward Alexander?

A. Yes, I do.

Q. Did they ask whether they resided in Minneapolis and you said yes?

A. Yes.

Q. Were you asked and did you give the answer that you dealt with the younger brother?

A. Well, I don't know—I know what that says there, yes, I was asked that.

Q. Did you say that?

A. Yes.

Q. Is Edward Alexander younger than Ferris Alexander?

Mr. Scott: Objection, your Honor.

The Court: If he knows. Overruled.

Q. Did you testify before the Grand Jury that you know Edward Alexander is younger than Ferris?

Q. And at that time, certain questions were put to you under oath, isn't that true?

A. True.

Q. And do you remember yesterday telling us about dealing with Mr. Alexander here?

A. Yes.

Q. And do you recall being asked in the Grand Jury about the Ferris brothers? Do you recall being asked that?

A. Yes.

Q. Do you remember telling them that you knew the Ferris brothers as Jacob Alexander—that would be Edward Jacob Alexander and Ferris Alexander; do you recall that?

A. No, I don't.

Q. Referring now to the Government's Exhibit 3504, would you just read that question and the answer?

Can you read it all right? As a matter of fact, to save some time, would you just read right straight down that page, please, for me.

Incidentally, do you know how many cartons were involved, actual boxes, involved in the first trip to Minneapolis?

A. No, I don't. I don't recall.

Q. You have no idea at all?

A. It was over ten cartons.

A. I really wouldn't know which is which.

Q. I am concerned about what you testified before the Grand Jury, Mr. Valentine. Let me show you the question.

Were you asked which brother, and did you say the younger brother?

The Court: That is repetitious. He has already told us that is what he said.

Q. And did you say the younger brother is Edward Alexander?

A. Yes, I did.

Q. All right. And that was under oath?

A. That's right.

Q. Was that the truth?

A. I don't know whether or not—

Q. To the best of your ability was that the truth?

A. To the best of my ability, yes, that was the truth.

Q. And did you also indicate before the Grand Jury that it was the younger brother that gave you the money?

A. I don't think I did.

Q. May I ask you to read this portion right here, please.

A. Yes.

Q. Did you say the younger brother would come back and pay you?

A. Yes, I did.

Q. Now let me ask you this. Have you had an opportunity to review your Grand Jury testimony?

A. I have read it, yes.

Q. In other words, before you came in here and testified the other day, didn't the government attorneys give you your Grand Jury testimony and ask you to read it over?

A. Yes, they did.

Q. Didn't they tell you that you might be examined on it or you might be shown portions of it that you would have to remember?

A. Yes, they did.

Q. And so you had an occasion to read your Grand Jury testimony over in preparation of testifying here, isn't that so?

A. Yes, I did.

The Government's affidavit and response to the Petition showed that its attorney spoke with Fahringer after the Petition was filed. The Government did not deny Fahringer's divided loyalty.

Although the Government submitted various exhibits attached to its affidavit in opposition to the Petition the Govern-

ment's only defense was that another attorney, this writer, also represented Petitioner at the trial, that the attorney who prepared the petition also represented a co-defendant and somehow because of this the Petitioner cannot complain that a conflict rendered his first attorney's representation insufficient, and that Fahringer instructed Ferris and Edward Alexander prior to the trial, "that he definitely would defend one and only one of them at trial if they both went to trial."

The Government did not allege that this writer participated in any of the decisions including whether or not Ferris Alexander would testify, call witnesses or waive a mistrial. The Government did not allege that Fehringer severed the attorney-client relationships he established with the three other co-defendants he represented. The Government did not contest that Fahringer represented three other co-defendants at least through the motion stages of the proceedings. The Government did not contest that Fahringer had received retainers from at least two co-defendants. The Government did not allege that any retainers were returned by Fahringer. The Government did not contest that Fahringer retained at least a subconscious loyalty and sense of responsibility to three other co-defendants. The Government did not contest that Petitioner wished to testify at the trial and his testimony would have exculpated himself and inculpated his brother, Edward, and Fahringer's other clients. The Government did not contest that Petitioner's brother Edward Alexander was willing to testify and Edward's testimony would have inculpated Edward but would have exculpated Petitioner. The Government did not contest that Petitioner desired to call his brother Edward as a witness. The Government did not contest that Petitioner was prevented from testifying and from calling witnesses by his attorney, Fahringer. The Government did not contest that a mistrial was declared because of prejudicial remarks made by a co-

defendant in the presence of the jury but that Fahringer declined the mistrial without first consulting Petitioner. The Government did not contest that Fahringer's determination not to call Petitioner, Edward Alexander and other witnesses to testify and whether to accept a mistrial were all hindered by Fahringer's divided loyalty between Petitioner and his other clients. The Government submitted no affidavit of Harold Fahringer. There were no facts in dispute and consequently no hearing was necessary. The Court found the above grounds to be frivolous and denied Petitioner's Petition to vacate the sentence.

The Trial Court based its denial upon the following memorandum:

> "The files and records of this Court show beyond preadventure that Herald Price Fahringer, Esq. did not represent Ferris Jacob Alexander in any real sense upon the trial until he had ceased to represent other defendants. Additionally, Robert J. Milavetz, Esq. represented Ferris Jacob Alexander throughout the trial. The record is plain that on the trial proper Mr. Fahringer represented only Ferris Jacob Alexander. The supporting affidavit of James M. LaRossa, Esq., who has since withdrawn from this application because "the manner in which Mr. Alexander seeks to secure habeas corpus relief is wholly incompatible with my own standards of professional responsibility," and the affidavit of Mr. Milavetz wholly fails to show any facts pointing to any specific instance of prejudice or real conflict of interest. In short, this application is frivolous and is therefore denied without a hearing. 28 U.S.C. 2255. *United States v. Lovano*, 420 F. 2d 769 (2 Cir.) cert. denied 397 U.S. 1071 (1970). *Hussey v. LaVallee*, 428 F. 2d 457 (2 Cir. 1970), cert. denied, 460 U.S. 995 (1971).

REASONS FOR GRANTING THE WRIT

1. The decision below in its affirmance of the Trial Court's decision conflicts with Glasser v. United States, 315 U.S. 60 1942.

Important questions are raised as to an attorney's undertaking to represent a defendant where he has duties to co-defendants whom he is not appearing for as counsel during the trial.

Almost three decades ago, this Court, in *Glasser v. United States*, 315 U.S. 60 (1942), made it clear that a conviction cannot stand where a conflict renders counsel's representation less effective than if the conflict did not exist. In *Campbell v. United States*, 352 F. 2d 359 (D.C. Cir. 1965), the Court held that the Trial Court has a duty to inquire as to whether a conflict exists where counsel represents more than one defendant. *Campbell* and other decisions of the various Circuit Court of Appeals have made it clear that the fact that defendant's counsel is retained rather than appointed does not bar a later claim that the conflict resulted in Sixth Amendment deprivation. *Craig v. United States*, 217 F. 2d 355 (6th Cir., 1954); *Larry Buffalo Chief v. State of South Dakota*, 425 F. 2d 271 (8th Cir., 1970). In *Larry Buffalo Chief* the Court stated that:

> "The right to the assistance of counsel means knowledgeable counsel who is unhampered or unfettered in his professional responsibility to the accused. This right to effective assistance of counsel is not necessarily waived because a defendant chooses to be represented by the attorney of his co-defendant". P. 278, 279.

Here, it is clear that counsel's representation was not unhampered in his responsibility to the Petitioner. At the very least, counsel was laboring under a responsibility to another defendant and possibly to three other defendants. In *Sawyer v. Braugh*, 358 F. 2d 70 (4th Cir., 1966), the Court demonstrated that when one co-defendant admits guilt and the other defendant denied any connection with the crime, there is a clear conflict. This is unquestionably analagous to the case at bar. See also, *Lugo v. United States*, 350 F. 2d 858 (9th Cir., 1965).

In *Porter v. United States*, 298 F. 2d 461 (5th Cir., 1962), the Circuit Court in reversing the conviction and ordering a new trial, held that a conflict existed where the Petitioner's attorney represented an individual who was not on trial but who was involved with the factual allegations in the indictment. Petitioner claimed that because of this conflict, evidence which was vital and beneficial to the defense, was withheld from the jury. Similarly in the instant case, counsel's divided loyalty resulted in the withholding of evidence favorable to the accused, specifically the testimony of the Petitioner and his brother.

Another decision which speaks to the issue at bar is found in *Holland v. Boles*, 225 F. Supp. 863 (N.D. West Vir. 1963). In *Holland*, the Petitioner was indicted with her sister for first degree murder. It was later developed that evidence existed which would demonstrate that one sister was solely responsible for the acts alleged. The Court, in granting the Petition, stated that the attorney

> ". . . was laboring under the impossible task of correctly and effectively advising two clients with divergent interests".

The Court went on to say that:

> "The law is clear that such an attempt to serve two masters with conflicting interests rendered the attorney incapable of giving to either the impartial, disinterested and effective representation that is the Constitutionally-protected right of each." P. 865.

In the case at bar, the facts reveal an unquestionable conflict which has accordingly deprived Petitioner of basic and fundamental Constitutional guarantees.

2. Important questions are raised as to the duties of disclosure by a prosecutor and of his conducting a fair trial.

The Government's conduct in severing a co-defendant for the purposes of aiding an in court identification of Petitioner without then disclosing the inability of their witness to distinguish between Petitioner and his brother to the Court and to Petitioner's counsel who also represented Petitioner's brother violated defendant's Fifth and Sixth Amendment rights and the duties imposed upon prosecutors by *Brady v. Maryland*, 373 U.S. 83 (1962), and other decisions of this Court.

The Government knew that the witness Valentine was in doubt as to the identity as between Petitioner and his brother, and figured that if both Petitioner and his brother were in the court room at the same time in the same trial, Valentine could not make a positive identification as between the two of them. The Government, to avoid the circumstance of their witness to distinguish between the two, caused the brother to be severed from the case and therefore to be absent while Valentine testified. Because Petitioner and his brother were represented by the same lawyer, the brother, naturally ab-

sented himself from the proceedings, leaving Petitioner alone to be singled out by the witness Valentine to be identified as the person who had allegedly engaged in the conduct charged in the indictment. The Government, Petitioner respectfully submits, was playing games by reason of the frailty of their witness Valentine to make an identification as between Petitioner and his brother and in so doing the Government created a circumstance which resulted in a suggestive in-court identification.

The Government further exploited the circumstance that Petitioner and his brother were represented by the same counsel. In so doing, the Government thrust upon counsel for Petitioner and his brother the questions: Whom should I protect? Petitioner or his brother? If I object to the Government's motion to sever the brother, I will be harming him? At the same time, because of the Government's failure to disclose Valentine's inability to make a positive identification as between Petitioner and his brother, am I justified in acquiescing in the Government's motion for severance of the brother?

The United States attorney had an affirmative duty to advise the Court in the case at bar of Fahringer's soon to be discovered dilemma. The Government extricated itself from the quagmire of its witness's change in testimony by severing Edward Alexander but buried Petitioner deeper by depriving him of effective assistance of counsel and of a fair trial in not disclosing this. This Court has required new trials where the Government deceives the Court since at least as early as *Mooney v. Hollihan*, 294 U.S. 104, 55 S. Ct. 340 (1935), and as recently as *Giglio v. United States*, 404 U.S. ——, 92 S. Ct. 763 (February 4, 1972). See also *Brady v. Maryland*, 373 U.S.

83, 83 S. Ct. 1194 (1962); *Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173 (1959). The Code of Professional Responsibility adopted by the American Bar Association on August 12, 1969 Canon 7-13 states:

> "The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict."

This Court has not stated whether Brady applies also prior to trial. The Government should have discosed the exculpatory evidence prior to trial for it to be meaningful. Please see *United States v. Westmoreland*, 41 FRD 419 (S.D. Ind.); *U. S. v. Gleason*, 265 F. Supp. 880 (S.D. N.Y.); *U. S. v. Morrison*, 43 FRD 516 (N.D. Ill., 1967).

3. Important questions are raised as to the proper role of a trial Judge in safeguarding a defendant's Fifth and Sixth Amendment rights from a possible conflict of interest by his attorney and there is a conflict between the Circuits as to the duty of the trial Judge to inquire as to whether a defendant is able to make a knowing and intelligent decision as to a defendant's choice of counsel who also represented co-defendants.

Compare *Campbell v. United States*, 332 F. 2d 359 (D.C. Cir. 1965), with *Paz Sierra v. United States*, 367 F. 2d 932 (2 Cir. 1966).

The trial Judge made no inquiry at the trial as to the possible conflict of interest either at the time of the Government's motion for severance or at the time of the Government's witness' testimony revealing his inability to distinguish between Petitioner and his jointly represented brother.

Glasser v. United States, supra, holds that a trial judge has the duty to see "that the trial is conducted with solicitude for the essential rights of the accused" which include the right "of an accused to have the assistance of counsel."

The District of Columbia Circuit and the Ninth Circuit require that the trial judge makes an affirmative determination that the defendants have intelligently chosen to be represented by the same attorney and that their decision was not governed by poverty and lack of information.

Campbell v. U. S., 332 F. 359, 360 (1965); *Kapian v. U. S.,* 375 F. 2d 895 (9th Cir.), cert. denied, 389 U.S. 839 (1967). The California and Florida Supreme Courts have imposed on the trial judge the requirement to advise the defendants of their rights to separate counsel. *People v. Chacon,* 69 Cal. 2d 765, 447 P. 2d 106, 73 Cal. Rptr. 10 (1968).

State v. Youngblood, 217 So. 2d 98 (Fla. 1968). *Wall v. State,* 214 So. 2d 384, required a Miranda-like warning about the possibility of inconsistent defenses evidences or trial tactics which might prejudice a defendant jointly represented. Illinois also required the trial judge to inform the defendants of a possible conflict of interest. *People v. Von Hyning,* 72 Ill. App. 2d 168, 219 N.E. 2d 268 (1966).

The Second Circuit, however, conflicts with the District of Columbia and Ninth Circuits in its decision in *U. S. v. Paz Sierra,* 367 F. 2d 932 (2nd Cir., 1966). This case was cited and relied upon by the Government in its brief to the Court of Appeals.

This Court should resolve the conflict between the circuits on this important question and hold that a trial Judge has an affirmative to inquire into a possible conflict of interest where a defendant is represented by an attorney who has past representations of a co-defendant in the same matter who is jointly

tried or present representations of a co-defendant who is subject to trial.

4. Important questions are raised as to the proper interpretation of Title 28 U.S.C. 2255 in a Trial Court's granting or denying a hearing and making findings in opposition to a petition outside of the record.

Section 2255 of Title 28 provides:

"§ 2255. Federal custody; remedies on motion attacking sentence.

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside

and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention." (Emphasis added.)

Petitioner's averments in his motion were uncontroverted by the Government. Petitioner's attorney also represented three co-defendants in the same matter but not as their trial counsel. The Court went outside the record and made a finding that there was no dual representation without a hearing.

The Trial Court denied Petitioner's Fifth and Sixth Amendment rights by failing to inquire at the trial but covered its failure by going outside the trial record without granting Petitioner a hearing.

By doing so, the Court must have made certain assumptions. The basis for the assumptions are outside of the record and are fallacious.

The District Court made three basic assumptions, all of which were false, in denying the petition.

First, the District Court assumed that an attorney representing only one defendant at a trial is not hindered during that trial by a past representation of a co-defendant being tried or by a present representation of a co-defendant who is not on trial. This assumption is false and does not recognize that an attorney's obligation to a client extends beyond the termination of his employment. Canon 4-6 states:

> "The obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment."

Canon 4-5 states:

> "A lawyer should not use information acquired in the course of representation of a client to the disadvantages of the client. . . ."

Second, the Court assumed that where a defendant has been represented by two attorneys that one attorney alone cannot cause a denial of a fair trial or a denial of other constitutional rights. This too is a false assumption. Fahringer's duty to represent his client zealously as provided in Canon 7 is not diminished by the fact that Fahringer had co-counsel. Petitioner's claim that Fehringer's divided loyalties hindered his effective representation can only be diminished had Fahringer or the Government claimed the co-counsel was primarily or partially responsible for the conduct of the trial. Neither the record showed nor did the Government suggest that Fahringer was not primarily and fully responsible for conducting the trial. The Government did not allege that either Fahringer or co-counsel submitted any decisions to the petitioner. Every

counsel can be presumed by a defendant to be free of conflicting interests of his attorney which would interfere with his independence of professional judgment. Canon 5-14 states:

> "Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant.

Canon 5-15 states:

> "If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation. A lawyer should never represent in litigation multiple clients with differing interests; and there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests. If a lawyer accepted such employment and the interests did become actually differing, he would have to withdraw from employment with likelihood of resulting hardship on the clients; and for this reason it is preferable that he refuse the employment initially. On the other hand, there are many instances in which a lawyer may properly serve multiple clients having potentially differing interests in matters not involving litigation. If the interests vary only slightly, it is generally likely that the

> lawyer will not be subjected to an adverse influence and that he can retain his independent judgment on behalf of each client; and if the interests become differing, withdrawal is likely to have a disruptive effect upon the causes of his clients.

Third, the Court assumed that a convicted defendant who is denied the right to testify and deny his guilt and denied the right to call exculpatory witnesses to refute a Government witness's testimony is not prejudiced.

This Court in the case of *Dukes v. Warden*, Docket No. 715172 heard arguments on March 20, 1972 on a petition for certiorari on the issue of was larceny defendant denied right to counsel by his representation at guilty plea hearing by attorney who, with defendant's knowledge, had, in an earlier criminal proceeding, represented two girls who were his co-defendants and had during that proceeding made derogatory remarks about defendant before same judge who presided at his guilty plea hearing?

The affidavits were present for the Appeals Court to make its own independent judgment. See *Brookhart v. Janis*, 384 U.S. 1, 86 S. Ct. 1245 (1966); *U. S. ex rel. Bruno v. Harold*, 408 F. 2d 125 (2 Cir. 1969). But the Appeals Court again went outside the record in sustaining the trial Judge's denial of petitioner's motion.

It is thus clear that petitioner's allegations were not frivolous and they stated a substantial serious constitutional deprivation. It is further clear that the allegations were not denied by the Government. Since the Government did not refute the allegations of the petition this Court may and should treat the allegations as true. *United States v. Williams*, 348 F. 2d 844 (2 Cir. 1965).

Since the petition presented substantial allegations of both prejudice and of constitutional violations it is clear that the District Court erred in dismissing the petition as frivolous.

In the event the Government had denied petitioner's allegations of fact the Trial Court would be required to have granted petitioner a hearing. See *Machibroda v. U. S.*, 368 U.S. 487, 82 S. Ct. 510 (1962); *Sanders v. United States*, 373 U.S. ——, 83 S. Ct. 1068 (1962).

Since however, the Government could not refute the facts alleged in the petition this Court must base its decision on the record. Petitioner's allegations are unrebutted. The questions before this Court are questions of law. The conviction should be vacated without a hearing.

This Court has reversed a Federal Appellate Court without requiring a hearing, per curiam, without explanation which had refused a denial of speedy trial claim never raised at trial or on appeal. *Jordan v. United States*, 352 U.S. 904, 77 S. Ct. (1956), reversing 233 F. 2d 362 (1955). Also see *Rodriguez v. United States*, 395 U.S. 327, 89 S. Ct. (1969); *Williams v. Kaiser*, 323 U.S. 471, 65 S. Ct. 363 (1945).

CONCLUSION

For these various reasons, certiorari should issue to review the judgment of the Second Circuit in this case.

Respectfully submitted,

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